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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

THOMAS SILKOWSKI, on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

APPLE INC., a CALIFORNIA corporation, and
DOES 1- 50, inclusive,

Defendant.

Case No.

COMPLAINT

CLASS ACTION

- 1. Violation of New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14, et seq.**

DEMAND FOR JURY TRIAL

1 Plaintiff THOMAS SILKOWSKI brings this action on behalf of himself and all others similarly
2 situated against APPLE INC., and states:

3 **I. NATURE OF ACTION**

4 1. Plaintiff brings this action individually and on behalf of all others similarly situated
5 against Apple Inc. (“Defendant” or “Apple”), alleging violations of the New Jersey Truth-in-Consumer
6 Contract, Warranty and Notice Act (“TCCWNA”), N.J.S.A. 56:12-14, *et. seq.*

7 2. The TCCWNA was enacted specifically to prevent deception in consumer contracts and to
8 incentivize businesses to draft contracts that are clear and understandable to all consumers, and that
9 clearly explain the legal rights of consumers and the legal responsibilities of businesses.

10 3. Defendant operates the iTunes Store, the Mac App Store, the App Store, the App Store for
11 Apple TV, the iBooks Store, and Apple Music (collectively the “Stores”).

12 4. In order to access the Stores, consumers must create an Apple ID and/or agree to the
13 iTunes terms and conditions (the “Terms and Conditions”). As a precondition to creating an Apple ID,
14 Defendant requires all consumers to agree to the Terms and Conditions.

15 5. The Terms and Conditions violate the TCCWNA because they contain provisions that
16 violate clearly established legal rights of Plaintiff and the proposed class, and ignore the legal
17 responsibilities of Defendant.

18 6. Specifically, the Terms and Conditions contain provisions that purport to: 1) disclaim
19 liability for claims brought for Defendant’s negligent, willful, malicious and wanton misconduct; 2) bar
20 claims for personal injury and punitive damages; 3) ban consumers from asserting claims against
21 Defendant for deceptive and fraudulent conduct; and 4) require Store users to indemnify and hold
22 harmless Defendant for any claims brought against Defendant for its negligent, willful, malicious and
23 wanton misconduct. All of the aforementioned provisions are in direct contravention of rights afforded
24 to Plaintiff and the proposed class under New Jersey law.

25 7. The inclusion of these violative provisions in the Terms and Conditions deceives
26 consumers into thinking that they are enforceable and accordingly, gives consumers the impression that
27 they are unable to enforce rights they otherwise have under New Jersey statutory and common law.

28 8. As a result of Defendant’s illegal conduct, Plaintiff, on behalf of himself and the Class,

1 seeks statutory penalties, actual damages, attorneys' fees, costs of suit, and any additional legal or
2 equitable relief the Court deems appropriate.

3 **II. JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

4 9. This Court has original jurisdiction of this Action pursuant to the Class Action Fairness
5 Act, 28 U.S.C §1332(d). The matter in controversy, exclusive of interest and costs, exceeds the sum or
6 value of \$5,000,000, and is a class action in which at least some members of the proposed class have a
7 different citizenship from Defendant. There are more than 100 putative class members.

8 10. The Northern District of California has personal jurisdiction over the Defendant named in
9 this action because Defendant is headquartered in this District and conducts substantial business in this
10 District.

11 11. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(b) because
12 Defendant is headquartered in this District and transacts substantial business in this District.

13 12. Assignment is proper to the San Jose Division of the Northern District of California under
14 Civil L.R. 3-2(c) and (e) because Defendant is headquartered in Santa Clara County and transacts
15 substantial business in Santa Clara County.

16 **III. PARTIES**

17 13. Plaintiff, Thomas Silkowski, is and, at all times relevant hereto, was, a resident and citizen
18 of the State of New Jersey.

19 14. Defendant Apple Inc. is a publicly traded company headquartered at 1 Infinite Loop,
20 Cupertino, California 95014 and is a citizen of California.

21 **IV. RELEVANT LAW AND STATUTES**

22 **A. The New Jersey Truth-in-Consumer Contract, Warranty and Notice Act**

23 15. The TCCWNA was enacted over thirty years ago because "[f]ar too many consumer
24 contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers.
25 Even though these provisions are legally invalid or unenforceable, their very inclusion in a contract,
26 warranty, notice or sign deceives a consumer into thinking that they are enforceable and for this reason
27 the consumer often fails to enforce his rights." Statement, Bill No. A1660, 1981 N.J. Laws, Chapter
28 454, Assembly No. 1660, page 2.

1 16. The primary goal of the TCCWNA is to prevent confusion and deception among
2 consumers as to both their legal rights, and the responsibilities of businesses operating in New Jersey.
3 The TCCWNA accomplishes this goal in three ways.

4 17. First, “No seller, lessor, creditor, lender or bailee shall in the course of his business offer
5 to any consumer or prospective consumer or enter into any written consumer contract or give or display
6 any written consumer warranty, notice or sign after the effective date of this act which includes any
7 provision that violates any clearly established legal right of a consumer or responsibility of a seller,
8 lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the
9 consumer contract is signed or the warranty, notice or sign is given or displayed.” N.J.S.A. 56:12-15.

10 18. Second, the TCCWNA prohibits any provision in a consumer contract or notice from
11 requiring the consumer to waive his or her rights under the TCCWNA. N.J.S.A. 56:12-16.

12 19. Third, the TCCWNA provides that a contract or notice cannot state in a general, non-
13 particularized fashion that some of its provisions may be void, inapplicable, or unenforceable in some
14 states, without specifying whether the provisions are void, inapplicable or unenforceable in New Jersey.
15 *Id.*

16 20. A “consumer” under the TCCWNA is “any individual who buys, leases, borrows, or bails
17 any money, property or service which is primarily for personal, family or household purposes.” N.J.S.A.
18 56:15.

19 21. A “consumer contract” is defined as a written agreement in which an individual, for
20 personal, family and household purposes, and for cash or credit:

- 21 a) Leases of licenses real or personal property;
- 22 b) Obtains credit;
- 23 c) Obtains insurance coverage;
- 24 d) Borrows money;
- 25 e) Purchases real or personal property;
- 26 f) Contracts for services; or
- 27 g) Enters into a service contract.

28 N.J.S.A. 56:12-1.

22. Any person who violates the TCCWNA “shall be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney’s fees and court costs.” N.J.S.A. 56:12-17.

B. Statutory and Common Law Rights of New Jersey Consumers

23. Under New Jersey common law, persons and entities have a duty to avoid unnecessary risk of personal and economic injury to others. Persons harmed by negligent acts have a clearly established right to recover damages under New Jersey common law.

24. Under New Jersey’s Punitive Damages Act (the “PDA”) persons are granted the right to recover punitive damages when they prove “that the harm suffered was the result of the defendant’s acts or omissions and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions.” N.J.S.A. 2A:15-5.12.

25. Under New Jersey’s Consumer Fraud Act (the “CFA”), N.J.S.A. § 56:8–2 *et seq.*, persons are granted the right to recover for fraudulent and deceptive conduct.

26. The CFA targets unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate, and is designed to address misconduct in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive, or other similar kinds of selling or advertising practices.

27. The CFA prohibits “[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby ... [.]” N.J.S.A. § 56:8–2.

28. The CFA entitles any person who suffers any ascertainable loss of money or property as a result of the use or employment by another person of any method, act, or practice declared unlawful under the CFA to recover treble damages, attorneys’ fees, filing fees, reasonable costs of suit, and any other appropriate legal or equitable relief. N.J.S.A. § 56:8-19.

29. In line with these rights, the New Jersey legislature has set forth the following examples of provisions that violate clearly established legal rights and responsibilities under the TCCWNA: “Examples of [] provisions [in violation of the TCCWNA] are those that deceptively claim that a seller or lessor is not responsible for any damages caused to a consumer, even when such damages are the result of the seller’s or lessor’s negligence. These provisions provide that the consumer assumes all risks and responsibilities, and even agrees to defend, indemnify and hold harmless the seller from all liability.” Statement, Bill No. A1660, 1981 N.J. Laws, Chapter 454, Assembly No. 1660, page 2.

V. FACTUAL BACKGROUND

A. The Terms and Conditions Were Presented to Plaintiff and the Class

30. As described above, Apple operates the iTunes Store, the Mac App Store, the App Store, the App Store for Apple TV, the iBooks Store, and Apple Music. The iTunes Store allows consumers to access, purchase or rent digital content for cash or credit. The Mac App Store, the App Store, the App Store for Apple TV and the iBooks Store allow consumers to license software products and digital content for cash or credit. Apple Music allows consumers to access digital music for cash or credit.

31. In order to access any of the Stores, consumers must create an Apple ID and/or agree to the Terms and Conditions. Before any consumer can create his or her Apple ID, he or she is presented with, and must agree to, the Terms and Conditions.

32. Plaintiff, an iTunes customer, was presented and agreed to the Terms and Conditions when he created his Apple ID and when he accessed the iTunes Store. Plaintiff has purchased hundreds of songs from the iTunes Store as well as several movies and other services.

33. The class members also were presented and agreed to the Terms and Conditions when they created their Apple IDs and when they accessed the Stores.

B. The Terms and Conditions Violate the TCCWNA

i. The Terms and Conditions violate N.J.S.A. 56:12-15

34. The Terms and Conditions presented to Plaintiff and the Class members contain provisions that violate clearly established legal rights and responsibilities.

35. The Terms and Conditions, in reference to the iTunes Store, state, “IN NO CASE SHALL APPLE, ITS DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS,

1 OR LICENSORS BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, PUNITIVE,
2 SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING FROM YOUR USE OF ANY OF THE
3 ITUNES SERVICE OR FOR ANY OTHER CLAIM RELATED IN ANY WAY TO YOUR USE OF
4 THE ITUNES SERVICE, INCLUDING, BUT NOT LIMITED TO, ANY ERRORS OR OMISSIONS
5 IN ANY CONTENT, OR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF
6 THE USE OF ANY CONTENT (OR PRODUCT) POSTED, TRANSMITTED, OR OTHERWISE
7 MADE AVAILABLE VIA THE ITUNES SERVICE, EVEN IF ADVISED OF THEIR POSSIBILITY.
8 BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE
9 LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH
10 STATES OR JURISDICTIONS, APPLE'S LIABILITY SHALL BE LIMITED TO THE EXTENT
11 PERMITTED BY LAW."

12 36. The Terms and Conditions, in reference to the Mac App Store, the App Store, the App
13 Store for Apple TV and the iBooks Store, state, "IN NO CASE SHALL APPLE, ITS DIRECTORS,
14 OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS, PRINCIPALS, OR
15 LICENSORS BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL,
16 OR CONSEQUENTIAL DAMAGES ARISING FROM YOUR USE OF ANY OF THE APP AND
17 BOOK SERVICES OR FOR ANY OTHER CLAIM RELATED IN ANY WAY TO YOUR USE OF
18 THE APP AND BOOK SERVICES, INCLUDING, BUT NOT LIMITED TO, ANY ERRORS OR
19 OMISSIONS IN ANY CONTENT, OR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A
20 RESULT OF THE USE OF ANY CONTENT (OR PRODUCT) POSTED, TRANSMITTED, OR
21 OTHERWISE MADE AVAILABLE VIA THE APP AND BOOK SERVICES, EVEN IF ADVISED OF
22 THEIR POSSIBILITY. BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE
23 EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL
24 DAMAGES, IN SUCH STATES OR JURISDICTIONS, APPLE'S LIABILITY SHALL BE LIMITED
25 TO THE EXTENT PERMITTED BY LAW."

26 37. The Terms and Conditions, in reference to the Apple Music, state, "IN NO CASE SHALL
27 APPLE, ITS DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS,
28 OR LICENSORS BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, PUNITIVE,

SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING FROM YOUR USE OF THE APPLE MUSIC SERVICE OR FOR ANY OTHER CLAIM RELATED IN ANY WAY TO YOUR USE OF THE APPLE MUSIC SERVICE, INCLUDING, BUT NOT LIMITED TO, ANY ERRORS OR OMISSIONS IN ANY CONTENT OR APPLE MUSIC PRODUCTS, OR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT OR APPLE MUSIC PRODUCTS POSTED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE APPLE MUSIC SERVICE, EVEN IF ADVISED OF THEIR POSSIBILITY. BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES OR JURISDICTIONS, APPLE'S LIABILITY SHALL BE LIMITED TO THE EXTENT PERMITTED BY LAW.”

38. Each of these provisions violate clearly established legal rights of Plaintiff and the Class, and misstate the clearly established legal responsibilities of Defendant, under New Jersey law, including New Jersey common law, the CFA and the PDA.

39. These provisions violate the clearly established legal rights of Plaintiff and the Class to recover damages for Defendant’s negligent conduct and for Defendant’s violations of the CFA. They also violate Plaintiff’s and the Class’s clearly established legal right to seek punitive damages under the PDA for Defendant’s malicious, wanton or willful misconduct. Similarly, these provisions violate clearly established legal responsibilities of Defendant to refrain from causing unreasonable risk and harm to Plaintiff and the Class, to refrain from causing Plaintiff and the Class to purchase and/or license content or products from the Stores through deception and fraud, and to refrain from acting willfully and maliciously, or with wanton disregard and thereby harming Plaintiff and the Class. For all of these reasons, the Terms and Conditions violate the TCCWNA.

ii. The Terms and Conditions violate N.J.S.A. 56:12-16

40. The Terms and Conditions presented to Plaintiff and the Class members contain provisions that state in a general non-particularized fashion that they are void, inapplicable or unenforceable in some jurisdictions, without stating whether they are void, inapplicable or unenforceable in New Jersey.

41. The Terms and Conditions, in reference to licensed applications, state, “TO THE

EXTENT NOT PROHIBITED BY LAW, IN NO EVENT SHALL LICENSOR BE LIABLE FOR PERSONAL INJURY OR ANY INCIDENTAL, SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, BUSINESS INTERRUPTION, OR ANY OTHER COMMERCIAL DAMAGES OR LOSSES, ARISING OUT OF OR RELATED TO YOUR USE OR INABILITY TO USE THE LICENSED APPLICATION, HOWEVER CAUSED, REGARDLESS OF THE THEORY OF LIABILITY (CONTRACT, TORT, OR OTHERWISE) AND EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OF LIABILITY FOR PERSONAL INJURY, OR OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THIS LIMITATION MAY NOT APPLY TO YOU. In no event shall Licensor's total liability to you for all damages (other than as may be required by applicable law in cases involving personal injury) exceed the amount of fifty dollars (\$50.00). The foregoing limitations will apply even if the above stated remedy fails of its essential purpose."

42. This provision violates clearly established legal rights of Plaintiff and the Class, and legal responsibilities of Defendant under New Jersey law.

43. This provision violates Plaintiff's and the Class's clearly established legal right to recover from Defendant or a third-party for tortious conduct that causes personal injury. Likewise, this provision violates Defendant's duty to refrain from causing personal injury through its own negligent, reckless, willful, malicious or wanton misconduct.

44. Although the provision states that "SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OF LIABILITY FOR PERSONAL INJURY...SO THIS LIMITATION MAY NOT APPLY TO YOU," it fails to state whether the limitation is inapplicable or void in New Jersey. Accordingly, the Terms and Conditions violate the TCCWNA.

45. The Terms and Conditions, in reference to the iTunes Store, state, "BY USING THE ITUNES SERVICE, YOU AGREE, TO THE EXTENT PERMITTED BY LAW, TO INDEMNIFY AND HOLD APPLE, ITS DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS, AND LICENSORS HARMLESS WITH RESPECT TO ANY CLAIMS ARISING OUT OF YOUR BREACH OF THIS AGREEMENT, YOUR USE OF THE ITUNES SERVICE, OR

1 ANY ACTION TAKEN BY APPLE AS PART OF ITS INVESTIGATION OF A SUSPECTED
 2 VIOLATION OF THIS AGREEMENT OR AS A RESULT OF ITS FINDING OR DECISION THAT A
 3 VIOLATION OF THIS AGREEMENT HAS OCCURRED.”

4 46. The Terms and Conditions, in reference to the MAC App Store, the App Store, the App
 5 Store for Apple TV and the iBooks Store, state, “BY USING THE APP AND BOOK SERVICES, YOU
 6 AGREE, TO THE EXTENT PERMITTED BY LAW, TO INDEMNIFY AND HOLD APPLE, ITS
 7 DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS, PRINCIPALS,
 8 AND LICENSORS HARMLESS WITH RESPECT TO ANY CLAIMS ARISING OUT OF YOUR
 9 BREACH OF THIS AGREEMENT, YOUR USE OF THE APP AND BOOK SERVICES, OR ANY
 10 ACTION TAKEN BY APPLE AS PART OF ITS INVESTIGATION OF A SUSPECTED VIOLATION
 11 OF THIS AGREEMENT OR AS A RESULT OF ITS FINDING OR DECISION THAT A VIOLATION
 12 OF THIS AGREEMENT HAS OCCURRED.”

13 47. The Terms and Conditions, in reference to the Apple Music, state, “BY USING THE
 14 APPLE MUSIC SERVICE, YOU AGREE, TO THE EXTENT PERMITTED BY LAW, TO
 15 INDEMNIFY AND HOLD APPLE, ITS DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES,
 16 AGENTS, CONTRACTORS, AND LICENSORS HARMLESS WITH RESPECT TO ANY CLAIMS
 17 ARISING OUT OF YOUR BREACH OF THIS AGREEMENT, YOUR USE OF THE APPLE MUSIC
 18 SERVICE, OR ANY ACTION TAKEN BY APPLE AS PART OF ITS INVESTIGATION OF A
 19 SUSPECTED VIOLATION OF THIS AGREEMENT OR AS A RESULT OF ITS FINDING OR
 20 DECISION THAT A VIOLATION OF THIS AGREEMENT HAS OCCURRED.”

21 48. These provisions violate clearly established legal rights of Plaintiff and the Class, and
 22 legal responsibilities of Defendant under New Jersey Law.

23 49. These provisions violate clearly established rights of Plaintiff and the Class members by
 24 forcing Plaintiff and the Class to hold Defendant harmless for any claims caused by Defendant’s
 25 negligence, willful or reckless misconduct. In the same way, these provisions violate clearly establish
 26 legal responsibilities of Defendant by allowing Defendant to shirk its duty of reasonable care and forcing
 27 Plaintiff and the Class to indemnify Defendant for violations of Defendant’s duties under the law.

28 50. The provisions at issue violate the TCCWNA because they fail to state which of their

parts are inapplicable or void in New Jersey. Although the Terms and Conditions are a standard form contract, which based on information and belief, are presented to consumers in all fifty states in the same exact form, the provisions at issue state that they are applicable “TO THE EXTENT PERMITTED BY LAW.” As the Terms and Conditions are presented, and meant to apply, in multiple jurisdictions, if not all fifty states, the language “TO THE EXTENT PERMITTED BY LAW,” does not bound and limit the Terms and Conditions to comport with New Jersey law. Instead, this language is used to alert the reader in a general, non-particularized fashion that the provisions are inapplicable, void and unenforceable in some jurisdictions. Because these provisions fail to state whether they are inapplicable, void or unenforceable in New Jersey, the Terms and Conditions violate the TCCWNA.

VI. CLASS ALLEGATIONS

51. Plaintiff brings this class action on behalf of himself and all others similarly situated pursuant to Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all New Jersey residents who created an Apple ID within the applicable statute of limitations, and/or who, after having created an Apple ID, were asked by Defendant to agree to the Terms and Conditions at any time within the applicable statute of limitations.

52. Excluded from the Class are Defendant and its officers, directors and employees, the Court, the Court’s immediate family and all Court staff, and Plaintiff’s attorneys and their immediate family members.

53. Numerosity: The class described above is so numerous that joinder of all individual members in one action would be impracticable. On information of belief, hundreds, if not thousands of individuals have created an Apple ID and/or agreed to the Terms and Conditions. The disposition of the individual claims of the respective class members through this class action will benefit both the parties and this Court, and will facilitate judicial economy.

54. Ascertainability: The class is ascertainable because, on information and belief, Defendant keeps and collects the information of each class member in a detailed electronic database, and records when class members create an Apple ID and/or agree to the Terms and Conditions.

55. Typicality: Plaintiff’s claims are typical of the claims of the members of the class. The claims of the Plaintiff and members of the class are based on the same legal theories and arise from the

1 same unlawful conduct. The claims of Plaintiff and the Class arise from the same provisions which
2 uniformly are displayed in the Terms and Conditions. As such, the claims of Plaintiff and the Class rise
3 and fall together and are typical of one another.

4 56. Common Questions of Fact and Law Predominate: There are numerous question of law
5 or fact common to all class members. For example, whether the provisions at issue violate clearly
6 established law is a question common to all class members, and this question is susceptible to a common
7 answer. Similarly, whether the Terms and Conditions is a consumer contract is a question common to all
8 class members, and this question is susceptible to a common answer. These questions and others like
9 them predominate over individual issues. The same evidence needed to prove Plaintiff's individual
10 claims will be used to prove the claims of all class members.

11 57. Adequacy of Representation: Plaintiff is an adequate representative of the class because
12 his interests do not conflict with the interests of the members of the class. Plaintiff will fairly,
13 adequately, and vigorously represent and protect the interests of the members of the class and has no
14 interests antagonistic to the members of the class. Plaintiff has retained counsel who are competent and
15 experienced in the prosecution of complex consumer class action litigation.

16 58. Superiority: The injury sustained by each Class member, while meaningful on an
17 individual basis, is not of such magnitude that it is economically feasible to prosecute individual actions
18 against Defendant. Even if it were economically feasible, requiring myriad injured plaintiffs to file
19 individual suits would impose a crushing burden on the court system and almost certainly lead to
20 inconsistent judgments. By contrast, class treatment will present far fewer management difficulties and
21 provide the benefits of a single adjudication, economies of scale, and comprehensive supervision by a
22 single court.

23 59. Class certification also is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because
24 Defendant has acted or refused to act on grounds generally applicable to the Class, making appropriate
25 both declaratory and injunctive relief with respect to Plaintiff and the Class as a whole.

VII. CAUSES OF ACTION

CAUSE OF ACTION

Violation of Truth-in-Consumer Contract, Warranty and Notice Act

N.J.S.A. 56:12-14, *et seq.*

60. The allegations contained in the previous paragraphs are incorporated by reference.

61. Defendant is a “seller” under the TCCWNA. N.J.S.A. 56:12-15.

62. Plaintiff is a “consumer” under the TCCWNA. *Id.*

63. The Terms and Conditions are a “consumer contract” under the TCCWNA because they are a written agreement which governs the purchase and/or license of real or personal property and services for cash or credit, and the property and services obtained are for personal, family, or household purposes. N.J.S.A. 56:12-1.

64. The Terms and Conditions violate the TCCWNA because they include provisions that violate clearly established legal rights and responsibilities. N.J.S.A. 56:12-15.

65. The Terms and Conditions contain provisions, as detailed above, that purport to disclaim liability for harm caused 1) by Defendant’s negligence, 2) by Defendant’s acts that violate the CFA, and 3) by Defendant’s malicious, willful or wanton misconduct. The Terms and Conditions also contain provisions that preclude claims for punitive damages. *Id.*

66. Further, the Terms and Conditions contain provisions, as detailed above, that state in a general non-particularized fashion that some provisions are inapplicable or void in some jurisdictions without stating which provisions are inapplicable or void in New Jersey. N.J.S.A. 56:12-16.

67. Pursuant to N.J.S.A. 56:12-17, Plaintiff and the Class are entitled to a civil penalty of not less than \$100.00, or for actual damages, or both, together with reasonable attorney’s fees and court costs, and any additional relief the court deems appropriate.

VIII. PRAYER FOR RELIEF

68. Wherefore, Plaintiff, on behalf of himself and on behalf of the other members of the Class, requests that this Court award relief against Defendant as follows:

a. A declaratory judgment that the Terms and Conditions are in violation of N.J.S.A. 56:12-15 and 56:12-16;

b. Injunctive relief requiring the removal from the Terms and Conditions the

language declared in violation of N.J.S.A. 56:12-15 and 56:12-16;

- c. An Order certifying the class proposed by Plaintiff, and naming Plaintiff as class representative and appointing his counsel as class counsel;
- d. Payment of at least \$100, actual damages, or both, to Plaintiff and each class member;
- e. Payment of reasonable attorneys' fees and court costs; and
- f. The provision of whatever other relief the Court deems just, equitable and appropriate.

VIII. DEMAND FOR JURY TRIAL

69. Plaintiff hereby demands a jury trial for all of the claims so triable.

1 Dated: April 28, 2016

**CARLSON LYNCH SWEET KILPELA &
CARPENTER, LLP**

/s/ Todd D. Carpenter

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